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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 312

JOEL SIMON MEYERS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

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Recent decisions in the Third and Seventh Circuits regarding the use of the Allen charge are in direct conflict with the decision below.

In its Brief in Opposition, the Government cites two circuit court cases which, although decided a few weeks before the filing of the petition in this case, were still not reported at that time. *United States* v. *Fioravanti,* No. 17398, 38 LW 2016 (July 8, 1969) (3rd Circuit, decided June 16, 1969), petition for certiorari filed *sub nom. Paccione* v. *United States,* No. 333; *United States* v. *Brown,* No. 16772 (7th Cir., decided June 6, 1969), petition for certiorari filed, No. 551 Misc. Both cases flatly abolish the use of the standard Allen charge in their respective circuits, a policy in direct conflict with that of the Second Circuit, which upheld the Allen charge in this case.

The Government seeks to minimize this conflict by suggesting that the Third and Seventh Circuits have only or-

dered a "modification" of the Allen charge (Brief in Opposition 6). In fact, both courts, although not barring supplemental charges outright, eliminated the *sine qua non* of the Allen charge by prohibiting any language which implies a special duty of minority jurors to reconsider their views. That language is "the very real treachery of the Allen Charge", *United States* v. *Fioravanti, supra*, 38 LW at 2016, and was used by the trial court in this case.

Nor is the conflict minimized by the fact that convictions were not reversed in either of those cases. Neither case presented evidence of jury coercion which even approached that presented by this case. In fact, in *Fioravanti* the charge was not even a supplemental one, but rather was included in the main charge to the jury; and in *Brown* the direction to reconsider was given to both the majority and minority jurors. By contrast, the trial judge below gave the traditional Allen charge—with its warning to the minority—at the traditional time, after the jury reported that it was deadlocked. Moreover, unlike the judges in *Brown* and *Fioravanti*, he gave the charge knowing of the jury's numerical division.

Finally, it should be noted that both the Third and Seventh Circuits considered various constitutional implications of the Allen charge, suggesting possible fifth and sixth amendment violations. Each court, however, found it unnecessary to reach those issues under the circumstances of its case.

CONCLUSION

Review should be granted because the decision of the court below is in conflict with the decisions of other circuits, because it raises substantial constitutional questions, and because it sanctions a departure from the usual course of judicial proceedings so as to justify the exercise of this court's supervisory power.

Respectfully submitted,

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